



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MARCH 15, 2023

IN THE MATTER OF:

Appeal Board No. 627011

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 627010, 627011, the employer appeals from the decisions of the Administrative Law Judge, filed December 5, 2022, which overruled the Commissioner of Labor's objections as to timeliness, and overruled the initial determinations, disqualifying the claimant from receiving benefits, effective October 13, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and charging the claimant with an overpayment of \$13,104.00 in benefits recoverable pursuant to Labor Law § 597 (4).

In Appeal Board No. 627012, the employer appeals from the decision of the Administrative Law Judge, filed December 5, 2022, which overruled the alternate initial determination, disqualifying the claimant from receiving benefits, effective October 13, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by the employer prior to October 13, 2021, cannot be used toward the establishment of a claim for benefits.

At the combined a telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed for over twenty-three years by the employer, a hospital, as an environmental services supervisor. He worked Monday through Friday, from 3:00 pm to 11:00 pm, at \$27.50 per hour.

On or about August 18, 2021, and August 19, 2021, the employer notified all employees via email, that they were to be vaccinated by September 27, 2021, or face discharge. The employer's email also offered, in response to the question if "I am on a leave of absence, am I required to get vaccinated by the deadline" that "If your return-to-work date is after September 27, 2021, you will be required to have received at least your first COVID vaccine dose prior to returning to work." The claimant did not recall receipt of these emails, nor did he access his work email. The claimant was aware of the employer's vaccination requirement.

On September 23, 2021, the employer asked the claimant to scrub the gym floor. While using a machine titled "Big Blue", the claimant injured his shoulder. He assumed it would be better the following day. However, that same evening, he was unable to sleep due to his shoulder pain. He called in his absence to work, on September 24, 2021, and his next scheduled workday on September 27, 2021, due to his shoulder pain. On September 28, 2021, he saw a doctor for his shoulder who took x-rays and excused him out of work. The doctor also scheduled a follow-up visit for October 1, 2021. On September 29, 2021, the claimant filed a worker's compensation claim for his shoulder injury, sustained while working.

At the follow-up visit on October 1, 2021, the claimant's doctor sent him to an orthopedic specialist due to the immobility of his shoulder. While out, the claimant called in his absence from work daily through October 25, 2021, to access his sick time because he was physically unable to work. The employer had instructed the claimant to leave phone messages for a supervisor.

In the interim, the employer had elected to place all employees, who were unvaccinated as of September 27, 2021, including the claimant, on an unpaid two-week leave of absence, starting September 28, 2021, and to discharge them as of October 12, 2021, if they remained unvaccinated. The employer did not notify the claimant that he had been placed on unpaid suspension nor that the claimant would face discharge on October 12, 2021, for his vaccination status.

On October 12, 2021, the employer sent the claimant a certified letter discharging him from his employment as of October 12, 2021, for failing to receive the COVID-19 vaccination by October 12, 2021. The claimant did not read the letter. He continued to call in his absence due to injury daily. After the claimant failed to receive his paycheck while out on sick leave, he

went in to work to retrieve the paycheck. The employer's human resource manager handed him his paycheck and advised him that he had been terminated on October 12, 2021 for failing to obtain the COVID-19 vaccination. The claimant did not resign from his employment.

The claimant filed for unemployment insurance benefits on November 29, 2021, and his claim was made effective as of November 29, 2021. The claimant was granted unemployment insurance benefits and received \$13,104.00 in benefits prior to the redetermination of his claim.

Initial determinations bearing a mail date of August 25, 2022, were sent to the claimant. The claimant received the determinations, by mail, on or about September 1, 2022. The claimant requested a hearing by letter postmarked September 29, 2022.

OPINION: The credible evidence establishes that claimant received the initial determinations of voluntary separation and recoverable overpayment within five business days of their mail date of August 25, 2022, or on about September 1, 2022. The claimant's appeal letter was then postmarked September 29, 2022, and as a result, was within 30 days of the receipt of the initial determinations and is therefore timely. Accordingly, we conclude that the claimant is entitled to a decision on the merits.

The credible evidence further establishes that the employer discharged the claimant while the claimant was on a medical leave from work, for his failure to obtain a COVID-19 vaccination by October 12, 2021. In so concluding, we note that at the time the claimant was discharged, he was off work due to his injury. We note that the claimant had telephoned the employer on September 24, September 27, and every workday thereafter, to notify the employer that he was out due to injury. We find it telling that, at hearing, the employer offered no evidence or testimony of any contact or attempts to contact the claimant while the claimant remained out due to injury, such that the claimant was aware that he was suspended without pay and that his employment was in jeopardy due to his vaccination status. We find noteworthy that as of August 2021, the employer had notified employees that those employees who were on leave as of September 27, 2021, would be allowed to resume employment at the end of their leave so long as they received one vaccination dose. We find it significant that the employer offers no reason why this vaccination policy did not apply to the claimant who was, in fact, on leave as of September 27, 2021, through October 12, 2021, and thereafter. Hence, we find that due to the

employer's inconsistent enforcement of its vaccination policies, as well as the employer's lack of notice to the claimant as to his employment status, we cannot conclude that the claimant voluntarily resigned from his employment for failing to receive a vaccination. Nor can we conclude that the claimant committed misconduct for failing to receive the vaccination by October 12, 2021, because the claimant had not demonstrated, at that time, any intention to resume his employment as of that date. Accordingly, we conclude that the claimant was separated from his employment under non-disqualifying circumstances and was therefore entitled to the unemployment insurance benefits which he received. As the claimant was entitled to unemployment insurance benefits which he received, the claimant was not overpaid benefits and the benefits which he received are non-recoverable.

DECISION: The combined decisions of the Administrative Law Judge are affirmed.

In Appeal Board Nos. 627010, 627011, the Commissioner of Labor's timeliness objections are overruled.

In Appeal Board Nos. 627010, 627011 & 627012, the initial determinations, disqualifying the claimant from receiving benefits, effective October 13, 2021, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with an overpayment of \$13,104.00 in benefits recoverable pursuant to Labor Law § 597 (4); and disqualifying the

claimant from receiving benefits, effective October 13, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by the employer prior to October 13, 2021, cannot be used toward the establishment of a claim for benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER